

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1379

To be submitted by
MARK E. ARROLL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

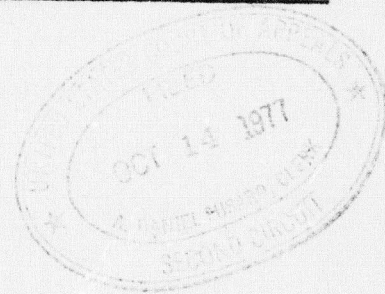
Respondent,

-against-

CLARK BRACEWELL a/k/a JOHN CLARK,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT



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STATEMENT OF ISSUE PRESENTED
FOR REVIEW BY THE APPEAL

The issues presented by the appellant are as follows:

1. Did the Court below err in granting the Government's motion to forfeit the sum of \$1,950.00 pursuant to 18 U.S.C. Section 3006(A)(F) in view of the express representation made by both the Government and the Court at sentencing to the contrary?
2. Did the Court below err in abusing its discretion in forfeiting defendant's \$1,950.00.

STATEMENT OF THE CASE

Defendant is an English national who was indicted on August 31, 1976. The indictment charges defendant in three counts with violating various narcotics laws of the United States. Count one charges defendant with engaging in a conspiracy to violate sections 812, 841(a) and 841(b)(1)(A) of title 21, United States Code. The indictment further charges the defendant in Count One with conspiring with Helen Brown to distribute and possess with intent to distribute a schedule I controlled substance in violation of 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(A). The controlled substances was liquid hashish.

Count Two charges the defendant with violating 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(A) and 18 U.S.C. 2, namely, possessing five pounds of liquid hashish with intent to distribute.

Finally, Count Three charges defendant with importing into the customs territory and into the United States from a place outside a Schedule I controlled substance, namely, five pounds of liquid hashish in violation of 21 U.S.C. 812, 951, 952 and 960 and 18 U.S.C. 2.

This indictment, #76 Cr 863 filed August 31, 1976, was superseded by a superceding indictment filed December 9, 1976, bearing # S 76 Cr 863.

The trial of this matter took place on December 20, 21 and 22 in the United States District Court, Southern District of New York, before the Hon. Charles H. Tenney and a jury. Defendant was found guilty on all three counts and was sentenced on February 4, 1977 to four years on each count, such sentence to run concurrently. Defendant was further ordered to a special parole of three years. Defendant was given leave to appeal in forma pauperis. A notice of appeal was filed on February 14, 1977. This appeal to the United States Court of Appeals for the Second Circuit was decided on May 4, 1977. This Court affirmed the conviction on May 4, 1977 under Docket # 77-1074. Defendant requests that as part of this record on

appeal there should be included the entire record on appeal of Docket # 77-1074 including but not limited to the briefs of the respective parties and the informal opinion of this Court rendered on May 4, 1977.

It is conceded that at the time of defendant's arrest on August 30, 1976 in the State of California the sum of \$1,950.00 was taken from the defendant, represented by \$1,000.00 Western Union money order and \$950.00 in cash.

Defendant was sentenced by the trial court on February 4, 1977. On the day of sentencing defendant had a motion returnable for arrest of judgment, new trial, as well as an application for the Government to turn over to the defendant the aforesaid \$1,950.00. No order was entered with respect to the return of the \$1,950.00. The reason for this was that the Government took the position that the money should not be returned until certain conditions occurred, namely, the result of the then appeal to be taken and until a reasonable time expired for tax claims to be asserted regarding this money (See page 369 of transcript). The appeal was taken and the conviction unanimously affirmed by this Court. Defendant did not seek certiorari to the United States Supreme Court. No tax claims have been asserted by anyone to this money.

Following the affirmance of defendant's conviction, the Govern-

ment formally moved to have this sum forfeited and turned over to the Government pursuant to 184 U.S.C. 3006(A)(F) as reimbursement for the sums paid by the Government to defendant's court appointed attorney. The sums paid to defendant's attorney by the Government were in excess of \$1,950.00. This motion was opposed but ultimately granted by Judge Tenney pursuant to an order dated August 11, 1977. A notice of appeal was filed on August 21, 1977.

Mark Arroll, the previously appointed court appointed attorney thereafter made a motion to withdraw as counsel. This motion was denied and by order dated September 16, 1977, Mark Arroll was appointed counsel for this appeal.

POINT I

THE SUM OF \$1,950.00 SHOULD NOT HAVE BEEN FORFEITED BUT SHOULD BE RETURNED TO THE DEFENDANT BECAUSE OF THE EXPRESS REPRESENTATIONS MADE BY THE UNITED STATES ATTORNEY AND THE COURT AT SENTENCING AND FURTHER BECAUSE ANY SUCH RETENTION OF DEFENDANT'S FUNDS IS AN UNCONSTITUTIONAL FORFEITURE AND CONSTITUTES AN ABUSE OF THE COURT'S DISCRETION.

The primary basis for defendant opposing the Government's motion and requesting that the \$1,950.00 be returned to defendant is because the Government on the record promised to return the money. See page 364 of the transcript.

Although the basis of the Government's motion is 18 U.S.C. Section 3006(A)(F) (see page 2 of Government's memorandum of law submitted below), we are once again entreated to the argument that the money was the proceeds from the sale of hash oil which was not the subject matter of the indictment. See page 2, paragraph 3 of the Akerman affidavit. This reference is obviously inserted to create an aura of prejudice to the defendant's claim to the money by portraying him in the most unfavorable light possible. There are several rejoinders to this argument. In the first place it is irrelevant. This is so because the indictment does not even charge the defendant with making any sales or receiving any monies. Since

this is not even alleged in the indictment no "proof" may be offered of any such sales. Furthermore, in the informal opinion of the United States Court of Appeals annexed to the Government's motion papers on page 3 thereof can be found the following language:

"The statement in summation by the United States Attorney that the money order and case found on Bracewell were the product of drug sales was, we agree, not sufficiently supported by evidence..."

The reference in the Government's brief that the United States Court of Appeals unequivocally held that the Government is entitled to hold the \$1,950.00 is taken totally out of context. In the first instance this issue was not before the Court of Appeals. In order to understand the comment of the Court of Appeals a brief chronology by way of reminder to the Court may be in order.

Defendant was found guilty on all counts on December 22, 1976. Sentencing was ultimately set for February 4, 1977. On the day of sentencing a motion was made returnable asking for multiple relief including a new trial, arrest of judgment and for returning the aforesaid \$1,950.00. Judge Tenney denied the motion for a new trial and for arrest of judgment. No order was entered with respect to the return of the \$1,950.00. The reason for this is that the Government took the position that the money should not be returned until two conditions occurred or events transpired.

The first event was the anticipated appeal of the defendant.

The Government argued that an appeal might result in a new trial and if that were to happen the money order and cash would be needed as exhibits at the new trial and should not now be released. This reason has been obviated. The Court of Appeals has affirmed the conviction on May 4, 1977 and the time to seek certiorari to the United States Supreme Court has expired and defendant has no intention of seeking certiorari.

The second argument advanced by the Government for the temporary retention of the money is that a tax claim might be asserted to it. The Court agreed that both the United States Government and England should be given a reasonable opportunity to make such claim. Accordingly the Court off the bench indicated that such motion was either being denied without prejudice to a renewal at an appropriate time or that it was being held in abeyance.

The fact that these were the only two arguments raised by the Government for temporarily retaining this money can be found at page 364 of the transcript where in opposition to defendant's motion for return of the \$1,950.00, Mr. Akerman, on behalf of the Government stated the following;

"The other issue that was raised in the papers with respect to the return of the money, the Government will return the money once it has been determined that there will be no further appeal, and, further, that the English authorities are not interested in prosecuting Mr. Bracewell, since this money would be clearly evidence if there was a new trial or if

the English authorities were interested in prosecuting Mr. Bracewell, or, indeed if the Internal Revenue Service of Great Britain were interested in attaching that money since I believe Mr. Bracewell did not pay taxes on the sale of that hash oil in England."

The Court stated on page 369 as follows:

"The Court: There is evidence in the case I think the Government is entitled to hold on to it until the time to appeal has been exhausted and until they are assured that there are no other claims by other people to these funds."

In the context in which the Court was speaking the claims of third parties were either tax claims or claims by the English Government for this money in some proceeding in England. No such claims have been made by anyone. At no time did the Government during the trial or sentencing request this money be forfeited under 18 U.S.C. 3006(A)(F).

The sum and substance of these statements by the Government and the Court was that the Government was not making any claim for this money but merely wanted to hold onto it until the appeal was exhausted so as to avoid the problem of losing possible exhibits in the event of a new trial and to give more opportunity for any third parties to make a claim for this money. The appeal has been taken and the conviction affirmed. No claims have been made to this money by any third party nor does the Government even suggest that any such claims have been made by anyone.

With all due respect the Government and this Court should honor their commitments especially those made on the record.

The order granting the motion of the Government for what amounts to forfeiture of this money pursuant to 18 U.S.C. 3006(A)(F) to reimburse the Government for attorneys fees expended should be reversed even if the promises made by the Government at sentencing had not been made. The above authority which gives the Court authority to order a defendant with assets to reimburse the United States Government for legal expenses incurred was never intended to seek such reimbursement when (a) it knew of the existence of the assets all along and nevertheless appointed free counsel and (b) such "reimbursement" would leave the defendant literally destitute. In this conjunction, defendant submitted as part of its opposing papers in the District Court a letter of Michelle Ohren, the defendant's mother, dated May 23, 1977, attesting to defendant's financial plight, the fact that the money was lawfully obtained and the indebtedness of defendant to his mother and stepfather.

This issue was never previously properly before the Court of Appeals in the first appeal (Docket # 77-1074). In appellant's brief to the Court of Appeals the Court was advised of defendant's motion returnable February 4, 1977 requesting return of this money but that no decision had been rendered despite a letter by counsel

dated February 19, 1977 requesting a formal decision or order. The Government in its brief to the Court of Appeals also took the position that this matter was not properly before them. As the Government acknowledged in its memorandum of law submitted in support of its motion below for forfeiture, it argued before the Court of Appeals (Docket # 77-1074) that "...if Bracewell's conviction was affirmed, a motion would be filed before Judge Tenney requesting that these funds be applied to the reimbursement of defendant's Court appointed lawyer under Title 18, United States Code Section 3006(A)(F)..."

Therefore any suggestion that the language of the Court of Appeals on the first appeal (Docket # 77-1074) decided this issue and has precluded this Court from now making a determination is simply not true. If it were so, there would have been no need for the Government to make this motion after the first appeal was decided. The quoted language of the Court of Appeals in its decision of May 4, 1977 can only mean that the Government is entitled to hold the money pending a determination of its promised motion which has now been made.

The fact that the Court of Appeals did not and could not finally decide this issue on the previous appeal is conclusively demonstrated by the Appellate brief of the Government in Docket # 77-1074. Point VI of its brief (p. 33) is entitled:

"BRACEWELL IS NOT PRESENTLY ENTITLED TO THE \$1,000.00 WESTERN UNION MONEY ORDER AND THE \$950.00 IN CASH SEIZED FROM HIM AT THE TIME OF HIS ARREST." (Emphasis supplied)

On Page 34 of its brief after advising the Court of Appeals of its intended motion before Judge Tenney for reimbursement under 18 U.S.C. 3006 (A) (F) discussed above, the Government stated:

"If Judge Tenney should grant the Government's motion, the defendant could then properly raise an appeal with this Court."

The Government should not be permitted to retain this money because of its on the record promise to return same. Furthermore, the Government should not be permitted to retain this money as reimbursement for legal expenses because with full knowledge of the existence of this money since August 30, 1976 when it was seized from defendant, the Government acquiesced and consented to the appointment of two attorneys to represent the defendant, i.e. James Pascarella appointed October 7, 1976, Mark E. Arroll appointed November 12, 1976. At no time when these appointments were made did either the Government or the Court so much as hint that this modest sum be depleted to pay counsel. This is really a form of forfeiture in not too subtle disguise. The Court's attention is directed to a host of recent cases declaring such forfeitures void. Boyle v. Kelley, 53 App. Div. 2d 457 (2nd Dept. 1976); McClendon v.

Rosetti, 460 F. 2d 111 (CA 2d 1972); Matter of Abramowitz, New York Law Journal, February 3, 1977, Page 15 (Sup. Ct. Nassau Cty., Young, J.); Matter of Caggiano v. Frank, 78 Misc. 2d 187.

In Caggiano, supra, the Court stated the appropriate rule as follows:

"One of the basic principles guiding public life in this country is that no governmental body may confiscate a citizen's property without due process of law. (U.S. Const. 14th Amdt.; N.Y. Const., art. 1, Section 6; Goldberg v. Kelly, 397 US 254; Dobkin v. Chapman, 21 NY 2d 490; U.S. Code, tit. 28, Section 1343). Indeed, even when incidental to an arrest, a police seizure of property other than contraband (that is, the object or instrumentality allegedly used in the criminal activity such as drugs or weapons) is unconstitutional. (McClendon v. Rosetti, 460 F. 2d 111; see, Stengel v. Smith, 18 AD 2d 458). Here, the taking of cash, claimed incidental to a numbers running charge, appears not to be contraband, as opposed to the numbers stubs themselves. In any event, even were the initial seizure valid, later, when official prosecution for the claimed criminal activity ceased, by way of the dismissal of charges, then any arguable public right to the money dissipated. (See Aranofsky v. Grupposo, 72 Misc. 2d 701; Marshall v. Kennedy, 17 Misc. 2d 985, 988). Under such circumstances, there is little doubt but that petitioner is entitled to compensation for a government taking."

CONCLUSION

The order below forfeiting or otherwise turning over to the Government the sum of \$1,950.00 should be reversed and this sum

should be turned over to defendant forthwith and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 12, 1977

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